WARRANTS FOR ARREST OR SEARCH: IMPEACHING THE ALLEGATIONS OF A FACIALLY SUFFICIENT AFFIDAVIT

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I. INTRODUCTION

A. *The Facially Insufficient Affidavit*

Warrants for arrest or search are issued after an *ex parte* hearing at which a magistrate ordinarily receives an affidavit rather than oral testimony.[1] To be sufficient, the affidavit must establish probable cause in accordance with the criteria announced in a series of less-than-consistent Supreme Court cases.[2] A noncomplying affidavit is, of course, facially insufficient, and the magistrate should deny the request for a warrant. In some cases, however, the magistrate will erroneously issue a warrant on a facially insufficient affidavit.[3] Fortunately, his decision is not final. If the search is fruitful, the defendant will be permitted, at a hearing on a motion to suppress, to argue that the affidavit was facially insufficient and that the magistrate erroneously issued the warrant.[4] The suppression hearing, therefore, is the post-issuance procedure for dealing with a facially insufficient affidavit.

B. *The Facially Sufficient Affidavit*

Suppose that an informant tells a police officer that, after being invited into the defendant's home, he was shown a large quantity of

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While this article was awaiting publication, the decision in United States *ex rel.* Petillo v. New Jersey, 400 F. Supp 1152 (D. N.J. 1975), was announced. More than any other case, *Petillo* comes to grips with many of the issues to which this article is addressed. Of particular interest is the holding that, at a hearing on a motion to suppress, it may be constitutionally necessary for the state to disclose the identity of an informant whose information led to the issuance of a warrant. 400 F. Supp. at 1166-67 n. 8; *see* note 111, *infra.*

It should be noted that the decision in *Petillo* granted habeas corpus relief to the defendant in State v. Petillo, 61 N.J. 165, 293 A. 2d 649 (1972), *cert. denied*, 410 U.S. 945 (1973). The state case is cited *infra* at notes 11, 15, 36 and 37.

[1] Note, *Testing the Factual Basis for a Search Warrant*, 67 COLUM. L. REV. 1529 (1967); Comment, *The Outwardly Sufficient Search Warrant Affidavit: What if it's False?*, 19 U.C.L.A.L. REV. 96, 97-98 (1971).

[2] *See* United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Jones v. United States, 362 U.S. 257 (1960).

[3] *E.g.*, Spinelli v. United States, 393 U.S. 410 (1969).

[4] *See* cases cited *supra* note 2.

heroin by the defendant. The officer knows that the informant is an addict who can recognize heroin, but he does not know whether the informant is telling the truth. The informant has not previously given information to the police and therefore has no record of reliability. Were the officer to disclose all of the facts in an affidavit, it would be facially insufficient. If an affidavit is based on the statement of an informant, it must contain some of the circumstances that underlie the affiant's belief in the informant's credibility. In the present case, no such circumstance exists. Recognizing this deficiency, the officer drafts a false affidavit. He asserts that the informant had previously given information that led to the arrest and conviction of persons for possessing heroin. The affidavit is now facially sufficient, and the magistrate is deceived. In good faith, he issues the warrant. A search is made, heroin is seized, and the defendant is charged with possession. A motion to suppress is filed, and a hearing is held. At the hearing, the defense lawyer admits that the affidavit is facially sufficient. He seeks, however, to make a *sub-facial* attack, claiming a right to examine the affiant to prove the falsity of the affidavit.[5]

Consideration of such a claim at a suppression hearing is not explicitly required by any decision of the United States Supreme Court. Although the Court has occasionally assumed the propriety of a sub-facial attack,[6] it has, despite the urging of commentators[7] and even several of the Justices,[8] consistently refused to resolve the issue, letting it go by default to other decision makers. In some jurisdictions, the claim will routinely be considered by the judge who presides at the suppression hearing; in others, it will be considered only under limited circumstances; in still others, it will not be considered at all.[9] Whether, for reasons of fourth amendment magnitude, it ought to be considered is the subject of this article.

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[5] The hypothetical case is based on United States v. Harwood, 470 F.2d 322 (10th Cir. 1972).

[6] Rugendorf v. United States, 376 U.S. 528, 532 (1964).

[7] Forkosh, *The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment*, 34 OHIO ST. L.J. 297, 298-99 (1973); Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971) [hereinafter cited as Kipperman].

[8] North Carolina v. Wrenn, 417 U.S. 973 (1974) (Justice White and Chief Justice Burger, dissenting from denial of certiorari).

[9] For a collection of cases, see *id.* For collections and analyses, see sources cited *supra* notes 1 and 7. Additionally, see Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B. J. 9 (1970); 15 BUFF. L. REV. 712 (1966); 51 CORN. L. Q. 822 (1966); 34 FORD L. REV. 740 (1966); 8 IND. L. REV. 738 (1975).

II. Commonly Advanced Arguments for Prohibiting any Sub-Facial Attack at a Suppression Hearing

The cases prohibiting any sub-facial attack at a suppression hearing rest on a mind-boggling array of arguments. A commentator has described some of them as flimsy,[10] but the description was undoubtedly born of a surfeit of charity. In fact, none of the arguments will withstand scrutiny.

One of the oft-repeated arguments is that the warrant-issuing process so adequately protects fourth amendment values that review at a suppression hearing is unnecessary.[11] The meaning of this argument is not clear. If it is an assertion that magistrates routinely or even frequently seek information beyond the face of the affidavit, it is, as a matter of fact, simply insupportable. Although a magistrate who doubts the accuracy of an affidavit does have the legal authority to examine the affiant and others under oath,[12] there is no evidence that the authority is used to any considerable extent when the affidavit is facially sufficient.[13] A proceeding for the issuance of a warrant is *ex parte*. No defense advocate is present even to suggest the desirability of a sub-facial inquiry. The proceeding is marked by haste, and it is not unheard of for the magistrate to be a "sweetheart"—one whose pro-police bias is well known and to whom the police regularly resort for warrants.[14] The warrant-issuing process is barely adequate to screen out affidavits that are insufficient *on their face*. It is, therefore, fatuous to argue that it functions adequately to unearth sub-facial defects when the affidavit is facially sufficient.

The second argument for prohibiting sub-facial attacks at a suppression hearing is a counterpart to the first. It is that the law of perjury so adequately protects against the submission of false information to the issuing magistrate that review at a suppression hearing is unnecessary.[15] This argument fails in a number of respects. Search warrant affidavits frequently recount the observations not only of the affiant but of an informant who has given information to the affiant. If it is the informant who is the source of false information, the law

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[10] Note, *supra* note 1, at 1530.

[11] State v. Petillo, 61 N.J. 165, 174, 293 A.2d 649, 653 (1972), *cert. denied*, 410 U.S. 945 (1973). *See* People v. Bak, 45 Ill. 2d 140, 144, 258 N.E.2d 341, 343, *cert. denied*, 400 U.S. 882 (1970).

[12] *E.g.*, Fed. R. Crim. P. 4(c), 41(c).

[13] Comment, *supra* note 1, at 110.

[14] L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime 120 (1967).

[15] Note, *supra* note 1, at 1530. *See* People v. Bak, 45 Ill. 2d 140, 144, 258 N.E. 2d 341, 343, *cert. denied*, 400 U.S. 882 (1970); State v. Petillo, 61 N.J. 165, 174, 293 A.2d 649, 653 (1972), *cert. denied*, 410 U.S. 945 (1973).

of perjury is unavailing because the informant has not given information *under oath*, as the law of perjury requires.[16] If, however, it is the affiant who has given false information, the requirement of an oath is met, but other problems remain. A highly subjective *mens rea*—knowledge of falsity—is an essential element of perjury.[17] A lesser mental state will not suffice. Hence, if the affiant has recklessly or negligently misrepresented the truth, the law of perjury is inapplicable and can hardly be regarded as a deterrent. More importantly, even if the affiant knows the information is false, the law of perjury will not deter him from submitting it unless he believes that his veracity might be challenged. Viewing the process realistically, the only person who has an interest in challenging the affiant is the defendant. Neither the issuing magistrate nor the prosecutor is likely to do so.[18] If the defendant is prohibited from challenging the affiant's veracity, it will go unquestioned, and whatever deterrent effect the law of perjury might have had will be minimized to the point of negligibility. To deny a sub-facial attack by arguing that the law of perjury adequately guards against false affidavits is, therefore, nothing more than a judicial version of "Catch-22."

The third and fourth arguments for prohibiting sub-facial attacks at a suppression hearing are somewhat related. They are that using the suppression hearing as a vehicle for inquiring into sub-facial sufficiency would destroy the solemnity of the warrant-issuing process[19] and that it would result in the unseemly spectacle of one judge reviewing the decision of another.[20] Each argument is ludicrous. The decision to issue a warrant is, at very best, no more solemn than any other judicial decision. Indeed, because the proceeding is often hasty and always *ex parte*, it is likely to be less solemn than many other decisions that are reviewable. Moreover, an issuing magistrate seldom inquires into the truth of a facially sufficient affidavit.[21] Consequently, it is inaccurate to treat a sub-facial attack at a suppression hearing as a *review* of the issuing magistrate's decision. Rather, it is an inquiry of first instance. Finally, the defendant is permitted, at a suppression hearing, to attack the *facial* sufficiency of the affidavit

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[16] R. PERKINS, CRIMINAL LAW 454, 456, 458-60 (2d ed. 1969).

[17] *Id.* at 460; MODEL PENAL CODE § 241.1(1) (1962).

[18] Comment, *supra* note 1, at 110, 113-14. The question under consideration is analogous to the question of the efficacy of alternatives to the exclusionary rule. These alternatives have been characterized as "pie in the sky." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974) [hereinafter cited as Amsterdam].

[19] Note, *supra* note 1, at 1530.

[20] *Id.*

[21] Comment, *supra* note 1, at 110.

even though the issuing magistrate has already resolved that issue.[22] If the suppression judge agrees with the defendant, he is saying that the magistrate erred as a matter of law in issuing the warrant—that is, that he *stupidly or unreasonably* issued it. Can it be more unseemly if the suppression judge holds that the magistrate was *deceived* by a facially sufficient, but untrue, affidavit?

The fifth argument is that permitting a sub-facial attack at a suppression hearing would confuse the ultimate issue of the defendant's guilt with the preliminary issue of whether someone misrepresented information in an affidavit.[23] This argument is nonsensical. If the suppression hearing takes place before trial,[24] there is no possibility of confusion; if it occurs during a jury trial, the jury should be sent out of the courtroom; and if it takes place during a bench trial, the judge surely ought to know that the issues of guilt and probable cause are separate. Any confusion, therefore, can only be attributable either to procedural irregularity or to gross ignorance, over neither of which has the defendant any control and for neither of which should he be penalized.

The sixth argument rests on a notion of mutuality. The argument is that, because the government is not permitted to give extra-facial support to a facially *insufficient* affidavit, the defendant should be precluded from attacking a facially *sufficient* affidavit.[25] This argument, too, is fundamentally unsound. Occasionally, an affiant, possessing information sufficient to establish probable cause, will improvidently fail to put enough of it into the affidavit to make the affidavit facially sufficient. If the case is one in which a warrant is *not* constitutionally required, the government will be permitted, at a suppression hearing, to abandon the warrant and its defective affidavit and to rely, instead, upon all of the affiant's information to establish probable cause for the arrest or search.[26] However, if the case is one in which a warrant *is* constitutionally required, then only the information given to the issuing magistrate can be considered in determining whether there was probable cause.[27] In some instances, the information will comprise sworn, oral evidence *in addition to* the contents of a facially deficient affidavit. In that event, all of the

[22] See cases cited note 2 *supra*.

[23] Note, *supra* note 1, at 1530.

[24] Modern procedural systems require a pretrial motion and contemplate pretrial resolution. See FED. R. CRIM. P. 12(b)(3), 12(e).

[25] People v. Bak, 45 Ill. 2d 140, 145, 258 N.E.2d 341, 344, *cert. denied*, 400 U.S. 882 (1970).

[26] Bell v. United States, 371 F.2d 35 (9th Cir.), *cert. denied*, 386 U.S. 1040 (1967).

[27] *See* Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964).

information may be considered, not only by the issuing magistrate but also by the judge who conducts the suppression hearing.[28] But if an affidavit is the sole source of information received by the magistrate, then only the affidavit may be considered in determining whether there was probable cause. Other information, possessed by the affiant but not transmitted to the magistrate, must be ignored.[29] In this case, and in this case only, is the government prohibited from giving extra-facial support to a facially insufficient affidavit.

If the mutuality argument were really based on mutuality, it would treat defendant and government alike, giving each the same benefit and disadvantage. But it does not. Rather, it bars the defendant *in all instances* from making a sub-facial attack even though the government is prohibited *in but one instance* from offering extra-facial support. It is, therefore, far too one-sided to be based on any rational notion of mutuality.[30]

The seventh argument is that permitting sub-facial attacks at a suppression hearing would make it necessary for the government to disclose the identity of confidential informants and thereby jeopardize their safety or usefulness.[31] In *McCray v. Illinois*,[32] the United States Supreme Court held that a defendant has no constitutional right to compel disclosure of an informant's identity at a suppression hearing even though an arrest or search was based on the informant's information. In jurisdictions that follow *McCray*,[33] this holding makes it impossible for a defendant to sustain a sub-facial attack by examining a confidential informant. Logically, however, it should not bar a sub-facial attack as long as the defendant is willing to confine

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[28] *See* FED. R. CRIM. P. 41(c).

[29] *See* Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964).

[30] In any event, the mutuality argument proceeds from an erroneous premise. As indicated above, the government is prohibited from offering extra-facial support to a deficient affidavit only when two conditions are met: (1) a warrant is constitutionally required, and (2) the extra-facial support comprises information not transmitted to the issuing magistrate. To permit the government to supplement a facially deficient affidavit with information not transmitted to the magistrate would be to ignore the constitutionally required role of the magistrate. Prohibiting such extra-facial support is simply an implementation of the magistrate's role. It is not a justification for ignoring the role played by others in determining whether probable cause exists. The unarticulated premise underlying the mutuality argument is that, in a case involving a warrant, the only relevant question is whether the magistrate properly performed his role. The incorrectness of the premise is developed *infra*, text at nn. 85-90.

[31] *See* People v. Bak, 45 Ill. 2d 140, 145-46, 258 N.E.2d 341, 344, *cert. denied*, 400 U.S. 882 (1970).

[32] 386 U.S. 300 (1967).

[33] *McCray* does not prohibit disclosure. Hence legislatures and courts are free to develop criteria under which disclosure is permitted. For an example, see People v. Goggins, 34 N.Y. 2d 163, 313 N.E.2d 41, 356 N.Y.S.2d 571 (1974).

his examination to the affiant, whose identity is always disclosed in the affidavit, to an informant whose identity may be known,[34] or to any other witness of known identity. Yet, courts that rely on the *McCray* rule prohibit all sub-facial attacks, even those that do not impinge upon informer secrecy.[35] To that extent they abuse *McCray* in the same way they abuse the principle of mutuality, and the argument of informer secrecy cannot be taken seriously.

None of the commonly advanced arguments adequately supports the refusal of many courts to permit sub-facial attacks at a suppression hearing. Underlying some of the arguments, however, are two themes, one directly relating to the substance of the fourth amendment, the other dealing with its implementation. The substantive theme is that fourth amendment standards are met as long as an affidavit is facially sufficient to establish probable cause, that an affidavit's untruth is irrelevant to the concerns of the fourth amendment, and that sub-facial attacks are therefore unnecessary.[36] The implementational theme, baldly stated, is that sub-facial attacks implicate the exclusionary rule, that the costs of exclusion far outweigh the benefits, and that, to avoid the costs, it is necessary to tamper with the substance of the fourth amendment.[37] I shall explore the substantive theme after discussing the arguments commonly advanced in favor of sub-facial attacks. The implementational theme is but a specific illustration of the cosmic debate surrounding the exclusionary rule,[38] and is beyond the scope of this article.

III. Commonly Advanced Arguments for Permitting Sub-Facial Attacks at a Suppression Hearing

The question is not whether every sub-facial attack should be permitted without condition or restriction. Rather, the question is whether there are persuasive fourth amendment arguments for permitting at least some of them. If there are, it will then become appropriate to consider whether all such attacks should be allowed, or

[34] *E.g.*, United States v. Carmichael, 489 F.2d 983, 984 n.1 (7th Cir. 1973); United States v. Upshaw, 448 F.2d 1218, 1220 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972).

[35] See People v. Bak, 45 Ill. 2d 140, 258 N.E.2d 341, *cert. denied*, 400 U.S. 882 (1970).

[36] State v. Petillo, 61 N.J. 165, 177, 293 A.2d 649, 655 (1972), *cert. denied*, 410 U.S. 945 (1973). In *Petillo*, the court relied on Dumbra v. United States, 268 U.S. 435 (1925). The inapplicability of *Dumbra* is discussed *infra* at note 90.

[37] *See* State v. Petillo, 61 N.J. 165, 178, 293 A.2d 649, 655 (1972), *cert. denied*, 410 U.S. 945 (1973). *Cf.* United States v. Halsey, 257 F. Supp. 1002, 1006 (S.D.N.Y. 1966).

[38] For a comprehensive collection of materials, see Schrock and Welsh, *Up from Calandra: The Exclusionary Rule as A Constitutional Requirement*, 59 Minn. L. Rev. 251 (1974).

whether there are countervailing arguments of equal or greater weight for imposing limitations.

On the whole, cases that permit a sub-facial attack are about as poorly reasoned as cases prohibiting it. Some courts permit the attack without explanation.[39] Others rely solely on a rebuttal of reasons for prohibiting the attack[40]—a common, but insufficient, method of analysis. A few courts invoke the doctrine of "supervisory powers."[41] That doctrine, however, disclaims reliance on fourth amendment considerations, and is therefore beyond the concerns of this article.

Even courts that attempt to construct a fourth amendment rationale fail. Some characterize the evidence as "tainted"—*i.e.* as derivative of the misrepresentative affidavit—without clearly articulating why the affidavit violates the fourth amendment.[42] In effect, they rely on the exclusionary rule's policy of suppressing the fruit of the poisoned tree without establishing that the tree was really poisoned.[43] A few courts perceive a relationship between misrepresentative affidavits and probable cause, but they fail to develop it.[44] The best of a bad lot of legal analysis is the following statement from *United States v. Halsey*: "when the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing."[45]

The commentators have been almost as remiss as the courts. A publication of the American Law Institute argues for sub-facial attacks on the ground that the warrant-issuing procedure is *ex parte*.[46] The argument is true as far as it goes, but it does not go very far. It misses the question whether fourth amendment values are subverted by a facially sufficient, but misrepresentative, affidavit. In three widely cited articles—one of which has influenced several courts—the

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[39] *E.g.*, United States v. Pearce, 275 F.2d 318, 322 (7th Cir. 1960): "That such a hearing was proper is hardly open to question." *See* United States v. Marihart, 492 F.2d 897 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974).

[40] *E.g.*, United States v. Damitz, 495 F.2d 50, 54 (9th Cir. 1974).

[41] United States v. Carmichael, 489 F.2d 983, 988 n.13 (7th Cir. 1973). *See generally* Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

[42] United States v. Upshaw, 448 F.2d 1218, 1222 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972). *See* United States v. Belculfine, 508 F.2d 58, 61 (1st Cir. 1974).

[43] *See* Amsterdam, *supra* note 18, at 369.

[44] *E.g.*, United States v. Luna, 525 F. 2d 4, 8 (6th Cir. 1975); United States v. Morris, 477 F.2d 657, 663 (5th Cir.), *cert. denied*, 414 U.S. 852 (1973).

[45] 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966) (emphasis in original).

[46] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 570 (Prop. Off. Draft, April 15, 1975) (Commentary).

argument for sub-facial attacks is made to rest on the need for achieving the objectives of the exclusionary rule by deterring misrepresentative affidavits or preserving the integrity of the judicial process.[47] As noted above, however, the exclusionary rule does not come into play until a fourth amendment violation has been established, and characterizing a police practice as unsavory or dishonest does not automatically make it unconstitutional.

More commentators than judges assert that there is a relationship between misrepresentative affidavits and the fourth amendment's requirement of probable cause. Relatively few attempt to explicate it. Thus, it has been argued that there is no difference between an affidavit that is facially defective and one that is facially sufficient but misrepresentative;[48] and that it would make little sense to hold that probable cause cannot be established by a facially defective affidavit, but that the same affidavit, supplemented by false allegations, is sufficient.[49]

The most thoughtful effort to develop a fourth amendment theory in support of sub-facial attacks stresses the role or function of the issuing magistrate in protecting the right to privacy.[50] The magistrate is expected to be both neutral and detached, as opposed to being a rubber stamp for the affiant. This function is frustrated by baldly conclusory affidavits. Hence, an affidavit must contain enough factual information to enable the magistrate to make his own assessment of whether probable cause exists. Implicit in this requirement is a "concern for truth."[51] If the magistrate's function is frustrated by conclusions, it is equally frustrated by false information.

Although it is hard to disagree with these arguments, it must be recognized that, in a hierarchy of fourth amendment values, the role of the magistrate is derivative rather than primary. How we expect the magistrate to function and the extent to which we want to supervise his functioning depend ultimately on our perception of other fourth amendment values.[52] If searches or seizures could be made on hunch alone, magistrates would be luxuries, not necessities. But a

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[47] Kipperman, *supra* note 7, at 826, 830-31; Mascolo, *supra* note 9, at 17; Note, *supra* note 1, at 1530-31. The influential article is Kipperman's. *See* United States v. Belculfine, 508 F.2d 58, 61 nn. 3, 4 (1st Cir. 1974); United States v. Thomas, 489 F.2d 664, 670-71 (5th Cir. 1973); United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973).

[48] 51 CORN. L. Q. 822, 825 (1966).

[49] *Id. See* 15 BUFF. L. REV. 712, 717 (1966); 34 FORD. L. REV. 740, 744-45 (1966).

[50] Comment, *supra* note 1, at 107-8.

[51] *Id.* at 108.

[52] *Cf.* Gerstein v. Pugh, 420 U.S. 103, 112 (1975); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

hunch is not constitutionally sufficient. Probable cause is required,[53] and the warrant-issuing process is a device for giving it meaning.[54] Similarly, if exploratory searches or dragnet arrests were permissible, a formal, warrant-issuing process would be trivial. But such police practices are not constitutional.[55] Particularity is the fourth amendment's requirement,[56] and it, too, is served by the magistrate. A sound fourth amendment argument for permitting sub-facial attacks must, therefore, begin with a consideration of the function and importance of probable cause and particularity.

IV. THE FUNCTION, IMPORTANCE AND IMPLEMENTATION OF PROBABLE CAUSE AND PARTICULARITY—A FOURTH AMENDMENT RATIONALE FOR PERMITTING SUB-FACIAL ATTACKS

A. *Introduction*

The function of the bill of rights in general and of the fourth amendment in particular is to chart a course between a free society and a safe one.[57] If the members of a society never inflicted injury, the libertarian ideal would flatly prohibit all searches and seizures as pointless incursions into personal liberty. But that is not, and never has been, our society. Some searches and seizures must therefore be tolerated. It is not that they are good; it is that they are justifiable evils. As such, they are *exceptions* to the libertarian ideal[58] and must be kept within narrow bounds. The fourth amendment and its judicial gloss delineate the boundaries.

B. *Probable Cause and Particularity: The Prohibition of "General" or "Exploratory" Intrusions and the Value of Innocent Privacy*

The first requirement is probable cause. Within the meaning of this requirement it is imperative that the government have a reasonable basis in fact for believing that a crime has been committed.[59]

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[53] U.S. CONST. amend. IV. It is irrelevant to the concerns of this article that certain intrusions may constitutionally be authorized without probable cause. *See* Camara v. Municipal Court, 387 U.S. 523 (1967).

[54] *See* Gerstein v. Pugh, 420 U.S. 103, 112-13 (1975); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[55] Davis v. Mississippi, 394 U.S. 721 (1969); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[56] U.S. CONST. amend. IV.

[57] Gerstein v. Pugh, 420 U.S. 103, 112-14 (1975); Amsterdam, *supra* note 18, at 353-54.

[58] *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 50-51 (1974).

[59] Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961).

Absent such basis there can be no justification in the ordinary case for any search or for the seizure of any person or thing.[60]

The second requirement is particularity. The essence of this requirement is "focus." If the government proposes to take custody of a human being, it must focus on a specific person; if it proposes to take custody of a thing, it must focus on a specific thing and a specific place. It is not enough, for example, that the government has a reasonable basis in fact for believing that a murder has been committed. If the government wants to search for evidence of that crime, it must also have in mind specific evidence that is located at a specific place. Even the certainty that a crime has been committed will not justify a search for undifferentiated or unlocalized evidence.[61]

The third requirement is a mixture of probable cause and particularity. If the government proposes to seize a specific person, it must ordinarily have a reasonable basis in fact for believing that that person committed the crime in question; if it proposes to search for and seize a specific thing, it must have a reasonable basis in fact for believing that the object is crime-related and that it is located at the place to be searched.[62]

If the government's case fails in any of the above respects, the intrusion is said to be unconstitutionally "general" or "exploratory."[63] Although these words do not appear in the fourth amendment, the cases make it clear that they describe the very intrusion that the constitution-makers sought to prohibit.[64] Unfortunately, however, the words do not reveal why the constitution-makers regarded such an intrusion as intolerable. To answer that obviously crucial question, consider what life would be like if intrusions were permitted without probable cause and particularity. Undoubtedly, the police would continue to arrest criminals and to search for and seize crime-related objects. At the same time, they would arrest more *innocent* persons, enter more *innocent* premises, view more *innocent* activities, and seize more *innocent* objects than they now do.[65] But innocent privacy

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[60] *E.g.*, Henry v. United States, 361 U.S. 98 (1959).

[61] Kremen v. United States, 353 U.S. 346 (1957); Amsterdam, *supra* note 18, at 411.

[62] Comment, *supra* note 59, at 687-88.

[63] Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931).

[64] Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); Boyd v. United States, 116 U.S. 616, 624-27 (1886); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19-48 (1966); Weinreb, *supra* note 58, at 50.

[65] Indeed, one of the most persuasive arguments against permitting "stops" and "frisks" on less than probable cause was that the practice would increase police confrontations with innocent persons. See, for example, Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L. C. & P. S. 433, 445-53 (1967); Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L. C. & P. S. 251,

should not be associated solely with innocent persons, for even the guilty live lives that are for the most part innocent. If the police have probable cause to believe that D has stolen a suit, they may arrest him, but they may not indiscriminately seize every suit in his closet.[66] If the police have probable cause to believe that D has stolen a particular suit, they may arrest him and look in his closet, but they may not look in apparently innocent areas such as his medicine cabinet, or jewelry box, or diary.[67]

In a free society, innocent and guilty alike have a right to expect that official intrusions into any aspect of their innocent or apparently innocent lives will be kept to the barest minimum compatible with public safety. Intrusions without probable cause and particularity would defeat that expectation. Thus, the primary objective of the requirements of probable cause and particularity must be to bring that expectation close to reality by directing intrusive activity toward apparent guilt and away from apparently innocent privacy.[68]

C. *The Probable-Cause Process*

1. Introduction

At this point, it will simplify matters considerably if we omit further reference to particularity, and concentrate solely on the requirement of probable cause. Probable cause is a label that describes the results of a *process*. The process has three basic aspects: (1) acquiring information, (2) transmitting it, and (3) drawing inferences from it. The question that now arises is whether, given the importance of probable cause in the fourth amendment's scheme, a concern for accuracy either is or ought to be a part of the process.

As a predicate for answering the question, it is essential to note that the probable-cause process is divided into two sub-processes. One is the warrant-issuing process; the other, the process of warrantless action. The fourth amendment has not been interpreted to pre-

252-53 (1966). The evidence contributed by Professor Reich, based on personal experience, is impressive. Reich, *Police Questioning of Law-Abiding Citizens*, 75 YALE L. J. 1161 (1966).

The factual content of the argument was not rejected by the Court when it decided Terry v. Ohio, 392 U.S. 1 (1967). Rather, the Court was willing to tolerate the increased risk of innocent, but not too intrusive, confrontations in order to achieve the objectives of crime prevention and protection. *Id.* at 22-27.

[66] *See* Kremen v. United States, 353 U.S. 346 (1957).

[67] *Cf.* Warden v. Hayden, 387 U.S. 294, 299-300 (1967).

[68] *See* Brinegar v. United States, 338 U.S. 160, 176-77 (1949). *Cf.* United States v. Lefkowitz, 285 U.S. 452, 463-64 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931); Weinreb, *supra* note 58, at 50-54; Amsterdam, *supra* note 18, at 403, 432-33.

clude warrantless action. Although such action has been said to be ". . . per se [unconstitutional] under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,"[69] the exceptions, taken as a whole, are broad, and warrantless action is common.[70] Whether an intrusion is made with or without a warrant, however, probable cause is essential; and, even though this article focuses narrowly on intrusions with a warrant, it will be helpful to begin analysis by considering situations that do not involve a warrant.

2. Intrusion Without a Warrant

The question posed above may now be restated: whether, given the importance of probable cause in the fourth amendment's scheme, a concern for accuracy either is or ought to be a part of the probable-cause process in a case involving warrantless intrusion. If, for example, a police officer makes a warrantless arrest, may probable cause ever be said to exist if the crime for which the arrest was made had, as a matter of fact, been committed by no one? Suppose that a plain-clothes police officer is on duty at a department store that has recently sustained severe shop-lifting losses. The officer observes D standing next to a counter display of wallets. The officer knows that D has previously been convicted of shop-lifting. The officer observes D glancing around, taking a wallet and putting it in his coat pocket. From his observations, the officer infers that D has committed a theft. As a result of the inference, he arrests D and searches him. The search discloses that the only wallet in D's possession is his own, and that D is carrying a concealed weapon. Subsequent inquiry discloses that D had placed his own wallet on the counter and was putting it back in his pocket when he was observed by the officer. Did the officer have probable cause to arrest D? As a matter of objective fact, the officer was wrong. He began his observation after D had placed his own wallet on the counter. As a result, he drew an erroneous inference. The crime for which the arrest was made had been committed by no one. At the same time, it may be argued that the officer acted carefully in acquiring the information and evaluating it. He could not reasonably be expected to keep all customers under simultaneous and constant surveillance. Given his knowledge of D's record and his observation of conduct strongly suggestive of shop-lifting, his

[69] Katz v. United States, 389 U.S. 347, 357 (1967).

[70] L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 105-6 (1967).

inference, although wrong, was reasonable. If the fourth amendment is itself a compromise between a free society and a safe one, law enforcement officers must, to some extent, be permitted to rely on reasonable appearances. Even though arrests are an exception to the libertarian ideal, and even though exceptions ought to be narrowly confined, a standard of absolute accuracy would result in paralysis. Hence, balancing the interests at stake and keeping in mind that reasonable errors are inevitable, we would be justified in saying that the officer did have probable cause to arrest D for shop-lifting. That, of course, is what the cases have said for years. Even though probable cause is central to the operation of the fourth amendment, it is not synonymous with being right.[71]

To the extent indicated above, a concern for accuracy is not a part of the probable cause process in a case involving warrantless intrusion. That does not mean, however, that we ought to be unconcerned to any greater extent. Suppose that an officer arrests D without a warrant, searches him, finds a concealed weapon, and charges that offense. Prior to trial, D's lawyer files a motion to suppress the weapon. At the suppression hearing, the officer is the government's sole witness. He testifies, precisely in accordance with the situation above, that he arrested D, a known shop-lifter, only after observing D take a wallet from a counter display. The officer's testimony is, in effect, a *claim* that his action was based on facts establishing probable cause. Is that claim legally subject to attack through cross-examination or independent evidence, or are we so unconcerned with accuracy that we will uncritically accept a facially sufficient *claim*? To heighten the drama, assume that A, B and C are prepared to testify that they had dined with D in the store's cafeteria; that, as all four were leaving the store, the officer suddenly stopped, arrested and searched D; and that D at no time took anything from any counter display. Should their testimony be legally admissible?

If believed, the testimony of A, B, and C will refute the government's claim that it had acquired the information upon which a determination of probable cause must rest. If the officer is telling the truth, he did acquire the information; if the witnesses are telling the truth, he did not. Given the fourth amendment primacy of probable cause, the testimony of the witnesses should be admissible. Any other rule would make it unnecessary for the government to *have* knowledge as justification for intrusive action; the mere *claim* of such knowledge

[71] Gerstein v. Pugh, 420 U.S. 103, 112 (1975); Brinegar v. United States, 338 U.S. 160, 167 (1949).

would suffice. Pretense would be substituted for actuality, and the risk of invading *innocent* privacy would increase, contrary to the very function of the probable-cause requirement. No legitimate interest of government demands such a result; the fourth amendment, itself a compromise, prohibits it.

The jump from policy to precedent is apparently as short here as it was in the situation involving the erroneous, but reasonable, inference. I say "apparently" because I have found no case other than *McCray v. Illinois*[72] that even partially immunizes the testimony of the warrantless intruder from cross-examination or refutation. Indeed, even if one is disposed to read between the lines as much as possible in the government's favor, the position of all the authorities is that the officer's testimony is open to attack at the suppression hearing.[73]

The two situations discussed above are polar contexts for answering the question whether, in a case of warrantless intrusion, we ought to be concerned with the accuracy of the information and inferences that necessarily underlie probable cause. On the one hand, we permit reasonable reliance on appearances; on the other, we probe beneath the surface of the claim that the appearances existed. It is now appropriate to apply these approaches to a case that falls between the extremes.

Officer X receives a telephone call from Officer Y. "I'm on shop-lift duty at The Big Store," says Y. "I just saw D take a wallet from a counter display. He didn't pay for it. He got out of the store before I could arrest him. He often hangs out at Sam's Billiard Emporium. Go there and make the arrest." Relying on the information he has received from Y, X arrests D, searches him, and finds, not a stolen wallet, but a concealed weapon. After D is charged, he files a motion to suppress. At the suppression hearing, Officer X is the government's sole witness. He testifies that he arrested D after receiving the call from Y, and he relates the contents of the call. D is perfectly willing to concede that Officer X has testified truthfully. He proposes, however, to offer the testimony of A, B and C in an effort to establish that Officer Y did not observe the incident he recounted to X. Should the testimony be admissible?

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[72] 386 U.S. 300 (1967). In *McCray*, the warrantless intruder was a police officer who claimed to have acted on the basis of information from an informant. The officer's testimony was subjected to cross-examination. Full cross-examination was blocked, however, by the Court's holding that due process did not require disclosure of the informant's identity.

[73] *E.g.*, A. AMSTERDAM, B. SEGAL, M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 241 (3rd ed. 1974); Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 229 (4th ed. 1974). *Cf.* McCray v. Illinois, 386 U.S. 300, 314 (1967).

Note that Officer X is much like the officer in our first case.[74] He acquired information and drew two inferences from it. The first inference was that Officer Y was telling the truth; the second, that D had committed theft. In all respects, X acted reasonably. He correctly heard Y's statements, and he drew reasonable inferences. Surely it is reasonable for one officer to assume the veracity of another.[75] Officer Y, by contrast, is much like the officer in our second case.[76] His credibility is doubtful. If he observed the incident as he claimed to X, there was a factual basis for the arrest. If we believe A, B and C, however, that basis did not exist.

Given the policies underlying the fourth amendment and the function and importance of probable cause, there is no fourth amendment reason for excluding the testimony of A, B and C. To immunize the conduct of Officer Y from judicial scrutiny would, as in the second case, substitute pretense for actuality. Moreover, it would permit government employees—the *official* functionaries of the probable-cause process—to subvert that process by increasing the risk of invading innocent privacy. The fourth amendment speaks to officialdom. To Officers X and Y and all their law-enforcement colleagues we entrust the value of privacy and the delicate compromise that justifies intrusion. When, as in the present case, more than one official custodian of fourth amendment values participates in an impingement upon privacy, the knowledge and conduct of each should be relevant and subject to scrutiny. No legitimate interest of government requires that we drop an iron curtain between the activities of X and Y, thereby excluding Y's role, when the actions of both are the actions of government, and when the intrusion into D's privacy would not have taken place but for Y's unjustified instigation. The concern for accuracy in this case should be as great as it was in the second case.

Again, the leap from policy to precedent is short, although a bit longer than in the first and second cases. The only relevant Supreme Court decision is *Whiteley v. Warden*.[77] In that case, a magistrate erroneously issued a warrant on the strength of a facially insufficient affidavit. The sheriff to whom the warrant was issued then put out a radio bulletin ordering the arrest of the defendant and stating that a warrant had been issued. Relying on the bulletin, an officer arrested

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[74] P. 733 *supra*.

[75] United States v. Ventresca, 380 U.S. 102, 111 (1965). *See* Whiteley v. Warden, 401 U.S. 560, 568 (1971).

[76] P. 734 *supra*.

[77] 401 U.S. 560 (1971).

the defendant, searched him and found incriminating items. In the Supreme Court, one of the state's arguments was that, even though the warrant was defective, the arresting officer acted reasonably and, therefore, constitutionally in relying on the radio bulletin. The Court's response is instructive:

> Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.[78]

Whiteley is, of course, not an exact match for our third case. *Whiteley* involved an underlying warrant based on a facially insufficient affidavit, while our third case deals with wholly warrantless action. The difference, however, is insignificant. The quotation from *Whiteley* makes eminently good sense if paraphrased to read on the facts of the third case:

> Certainly police officers called upon to make warrantless arrests on the basis of information that other officers claim to possess are entitled to assume that the other officers are telling the truth. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.

It is, therefore, not surprising that lower federal courts have consistently read *Whiteley* as applying to wholly warrantless intrusions.[79]

The three cases considered above deal with warrantless action. They demonstrate that a concern for accuracy is, and ought to be, a part of the probable-cause process. If a single government functionary is involved, it is essential that, as a matter of fact, he acquire information supporting the reasonable belief that a prospective arrestee has committed a crime or that specific evidence of crime is located at a specific place. If several governmental functionaries are sequentially involved, as in the third case, the knowledge and conduct of

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[78] *Id.* at 568.

[79] Weeks v. Estelle, 509 F.2d 760, 763-64 (5th Cir. 1975); United States v. Murray, 492 F.2d 178, 188 (9th Cir. 1973), *cert. denied sub nom.* Roberts v. United States, 419 U.S. 854 (1974) (dictum); United States v. Averitt, 477 F.2d 1009, 1010 (6th Cir.), *cert. denied*, 414 U.S. 851 (1973). Some state courts, however, have overlooked *Whiteley*. See State v. King, 324 N.E.2d 292 (Ohio App. 1975). So has the American Law Institute. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 290.3(2) (Prop. Off. Draft, April 15, 1975).

each are subject to inquiry. That a functionary drew an erroneous inference from information is not important, unless the inference was unreasonable or the information was acquired in a careless way. That a functionary did not possess the information he claimed to possess, however, is crucial. The question that now arises is whether different rules should apply when one of the sequential functionaries is a magistrate—that is, when we shift from warrantless action to the warrant process.

3. Intrusion with a Warrant

A "warrant version" of our third case will illustrate the problem. Officer Y files with Magistrate X an affidavit for an arrest warrant. He asserts that, while on shop-lift duty at a department store, he observed D take a wallet without paying for it. Relying on Y's facially sufficient affidavit, X issues a warrant. D is arrested and searched, and a concealed weapon is found. After D is charged with unlawful possession of the weapon, he files a motion to suppress. At the suppression hearing, the government's sole evidence is the warrant with affidavit. D concedes that the affidavit is facially sufficient. He proposes, however, to offer the testimony of A, B and C (or to cross-examine Officer Y) to establish that the incident allegedly observed by Y did not take place. Should the testimony be admissible?

Note that Magistrate X is much like the innocent officer in our first[80] and third[81] cases. He acquired information and drew two inferences from it. The first inference was that Officer Y had filed a truthful affidavit; the second, that D had committed theft. In all respects, Magistrate X acted reasonably. He correctly read Y's affidavit and he drew reasonable inferences. Officer Y, however, is a counterpart to the officer of doubtful credibility in our second[82] and third cases. If he observed the incident as he claimed in the affidavit, there was a factual basis for the arrest. If we believe D's witnesses, however, that basis did not exist.

The fourth amendment policies underlying our resolution of the third case[83] need not be restated. Suffice it to say that they are fully applicable here. Given those policies, it is hard to understand how any court, especially after *Whiteley*,[84] could prohibit sub-facial attacks.

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[80] P. 733 *supra*.

[81] P. 735 *supra*.

[82] P. 734 *supra*.

[83] P. 736 *supra*.

[84] 401 U.S. 560 (1971), discussed *supra* in text at note 77 et seq.

That courts have done so bespeaks either ignorance or gross misperception of the probable-cause process.

In the second section of this article, I indicated that a substantive theme underlies some of the arguments against sub-facial attacks.[85] It is that fourth amendment values are served as long as an affidavit is facially sufficient, and that an affidavit's untruth is therefore irrelevant. Implicit in that theme is the premise that, in a case involving a warrant, the critical question is whether the *magistrate* properly performed his role. The premise is far too narrow. The critical question in all cases is whether the fourth amendment's goal of protecting innocent privacy was subverted by the actions of *any* of the functionaries of government who participated in the process that led to the intrusion. To answer that question, the knowledge and conduct of each of the functionaries must be considered. After all, it is the very essence of *Whiteley* that nothing in the fourth amendment is limited to a single functionary.[86]

It is true that, of the various functionaries who participate in the probable-cause and warrant-issuing processes, the magistrate is supposed to play a unique role. The assumption underlying the warrant clause of the fourth amendment is that innocent privacy will be jeopardized if the probable-cause process (the very core of the fourth amendment) is entrusted solely to law enforcement officers who, ". . . in the often competitive enterprise of ferreting out crime,"[87] are likely to draw every inference and resolve every doubt in favor of taking intrusive action. To safeguard innocent privacy, we therefore insist that a "neutral and detached"[88] magistrate draw the inferences and resolve the doubts. But the importance of this function should not blind us to the fact that it is only a *part* of the probable-cause process, and the final part, at that. The antecedent parts are the *acquisition* and *transmission* of the very information that the magistrate must evaluate. These parts cannot feasibly be administered by the magistrate and must therefore be entrusted to law enforcement officers. That we assign different parts of the probable-cause process to different functionaries is hardly reason for viewing either the parts or the functionaries in isolation. It does not trivialize the magistrate's inference-drawing task to say that it is no more important than the officer's task of acquiring information and

[85] *See* text *supra* at note 36.

[86] The statements made above explain why, in note 30 *supra*, I characterized the mutuality argument as resting on an erroneous premise.

[87] Johnson v. United States, 333 U.S. 10, 14 (1948).

[88] *Id.*

transmitting it to the magistrate. Indeed, it makes utterly no sense to ask only whether the magistrate drew a reasonable inference without asking whether the information from which he drew the inference was acquired carelessly or transmitted inaccurately.[89] Probable cause and its process are a whole. If any part is defective, if any functionary performs improperly, the whole fails, thereby increasing the risk of invading innocent privacy and subverting the fourth amendment's primary value.

When a court is concerned only with whether the *magistrate* had probable cause (that is, whether the magistrate properly performed his role), it indicates either that it does not understand the multifaceted nature of probable cause and its process or that it does not understand that each part is as important as any other. Sub-facial attacks are intended to expose the malfunctioning of the *law-enforcement* part, but no less to assert the *total* failure of probable cause and the consequent risk to innocent privacy. When a court prohibits sub-facial attacks by dropping an iron curtain between magistrate and affiant, it fragments the process to such an extent that the sum of the parts no longer equals the whole. To the same extent it diminishes the protection that innocent privacy is constitutionally entitled to receive.

To answer the question posed early in this section, a concern for accuracy must be a part of the probable-cause process (and of *each* of its components) whether an intrusion is made with a warrant or without one. In the warrant context, fidelity to fourth amendment principle requires that sub-facial attacks be permitted. Any other rule is manifestly and unarguably wrong.[90]

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[89] Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt; "if you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind."
Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146, 1157 (W.D. Pa. 1974), *aff'd*, 511 F.2d 199 (3rd Cir.), *cert. granted*, 95 S. Ct. 1989 (1975).

[90] I have omitted from discussion in the text a Supreme Court decision the result of which supports the arguments made above, but the opinion in which is too laconic to be helpful. The case is Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and its relevancy appears to have been overlooked by both courts and commentators. In *Silverthorne*, federal agents made a warrantless, general search of defendants' office and seized documents that contained evidence of a federal offense. After the documents were returned to the defendants by court order, the government sought their production by subpoena. The defendants refused to comply and were held in contempt. On writ of error, the Supreme Court reversed the contempt conviction. Although the subpoena was facially sufficient, it could not be insulated from the antecedent unconstitutionality. To do so, in the Court's view, would have reduced the fourth amendment "to a form of words." *Id.* at 392.

Silverthorne may be viewed merely as an application of the exclusionary rule's derivative evidence aspect, in which case it is hardly relevant to the problem under discussion. On the

V. THE SCOPE AND IMPLEMENTATION OF A RULE PERMITTING SUB-FACIAL ATTACKS

A. *Introduction*

The argument made in Section IV of this article was intended to answer the narrow question raised at the outset of Section III: whether there is a persuasive fourth amendment rationale for permitting at least some sub-facial attacks. Given the narrowness of the question, I felt justified in using an easy hypothetical case for purposes of illustration. The case was easy because it implied that the affiant, who was a police officer, had knowingly lied about matters that went to the very heart of the magistrate's probable cause determination.[91] If a sub-facial attack were not permitted in the hypothetical case, it would not be permitted in any case.

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other hand, the initial intrusion flagrantly violated standards for the protection of innocent privacy, and the Court's refusal to insulate the subpoena from antecedent unconstitutionality is much like permitting a sub-facial attack on the subpoena.

Although the subpoena-issuer in *Silverthorne* probably had knowledge of the antecedent unconstitutionality, *id.* at 391, it is hard to believe that good faith issuance would have led to a different result. Indeed, some courts have suppressed evidence obtained by search warrant where the warrant, although issued in good faith, was based on unconstitutionally obtained information. *E.g.*, White v. Commonwealth, 221 Ky. 535, 299 S.W. 168 (1927); Everhart v. State, abstracted in 17 Crim. L. Reptr. 2107 (Md. 1975). Ironically, in both *White* and *Everhart*, the court prohibited sub-facial attacks that were intended to expose *untruths* in the affidavit, apparently not recognizing that there is also an untruth in an affidavit that fails to disclose the manner in which the information was obtained, thereby leading the magistrate to assume that the information had been obtained constitutionally.

I have also omitted from the text a discussion of Dumbra v. United States, 268 U.S. 435 (1925), which some courts have relied on as authority for prohibiting sub-facial attacks. See note 36, *supra*. Commenting on the sufficiency of an affidavit that was based on the personal knowledge of the affiant, the Court said:

> In determing what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the *affiant* had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.

Id. at 441 (emphasis added). Taken out of context, the latter part of the Court's statement would appear to support the no-sub-facial-attack position. In context, however, it is clear that the Court did not drop an iron curtain between affiant and magistrate. To the contrary, it was concerned with whether the affiant had reasonable grounds for the very belief that led him to file the affidavit with the magistrate. Given the fact that the truth of the allegations was not questioned by the defendant, *Dumbra* is hardly strong support for permitting sub-facial attacks. But it is no support at all for prohibiting them. *See* Kipperman, *supra* note 7, at 827-28; 34 FORD. L. REV. 740, 744 (1966).

[91] P. 738 *supra*.

Real life, however, involves hard cases as well as easy ones. Consider the following variations of the hypothetical case.

(1) In his affidavit, the affiant truthfully recounts information supplied by Z. Z, however, knowingly lied to the affiant about a material matter, and the affiant innocently transmitted the lie to the magistrate. Has the fourth amendment been violated if Z is (a) another police officer, (b) an informant who has a working relationship with the police, or (c) a private citizen who has never given information to the police and who volunteered the information on the present occasion?

(2) The source of a material misrepresentation is a person whose knowledge or conduct may be drawn into question by a sub-facial attack. Has the fourth amendment been violated if the misrepresentation was (a) reckless rather than purposeful or knowing, (b) negligent rather than reckless, or (c) innocent rather than negligent?

(3) The source of a misrepresentation is a person whose knowledge or conduct may be questioned sub-facially. The person's culpability satisfies the answer to question (2). Has the fourth amendment been violated if the affidavit, purged of the misrepresentation, still establishes probable cause?

The three sets of questions posed above have vexed both judges and commentators—even those who do not oppose all sub-facial attacks.[92] This is far from surprising, however. As indicated in Section III, both case law and commentary have failed to develop a cohesive fourth amendment rationale in support of sub-facial attacks.[93] Although the absence of such a rationale does not necessarily impede the resolution of easy cases, it inevitably complicates the task of dealing with hard ones. Part of the utility of the rationale advanced in Section IV is that it should facilitate answering at least some of the questions posed above.

B. *Misconduct by an Informant*

The first set of questions deals with the persons, other than the affiant, whose knowledge or conduct may be questioned sub-facially. The issue has arisen infrequently, undoubtedly as a result of the constraints imposed by *McCray v. Illinois*.[94] When those constraints have been absent, however (as in a case in which the informant's

[92] *E.g.*, United States v. Thomas, 489 F.2d 664 (5th Cir. 1973); United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); Kipperman, *supra* note 7; Comment, *supra* note 1.

[93] *See* text *supra* at note 39 et seq.

[94] 386 U.S. 300 (1967), discussed *supra* in text at note 32.

identity is known), some courts have nevertheless limited sub-facial attacks to the affiant, thereby insulating any informant from scrutiny.[95] Although this position finds impressive support in the American Law Institute's Model Code of Pre-Arraignment Procedure,[96] it is, in my judgment, demonstrably wrong.

The easiest case to deal with initially is one in which the affiant has transmitted to the magistrate information received from another law enforcement officer. As indicated in Section IV, the question in all cases is whether the fourth amendment's goal of protecting innocent privacy was subverted by *any* of the functionaries of government who participated in the process that led to the intrusion.[97] If the government entrusts the probable-cause process to multiple *official* functionaries, the knowledge and conduct of each should be subject to examination. Indeed, this principle, extrapolated from *Whiteley v. Warden*,[98] underlies a sub-facial attack on the *affiant's* credibility.[99] Once it is accepted that the fourth amendment's concept of probable cause requires scrutiny of the knowledge and conduct of the affiant, it follows that examination must be made of the knowledge and conduct of all other *official* functionaries who participated in the process that led to the intrusion. Any other result would, in fourth amendment terms, be unprincipled.[100]

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[95] *E.g.*, United States v. Carmichael, 489 F.2d 983, 989 (7th Cir. 1973); United States v. Jutz, 389 F. Supp. 506, 508-9 (E.D. Wisc. 1975).

[96] Section SS290.3(1) (Prop. Off. Draft, April 15, 1975).

[97] See text *supra* at note 86 et seq.

[98] 401 U.S. 560 (1971).

[99] The point is discussed *supra* in text at note 84 et seq.

[100] The statements made in the text are not inconsistent with Dumbra v. United States, 268 U.S. 435 (1925), a related aspect of which was discussed in note 90 *supra*. Although the Court stated that it was "concerned only with whether the *affiant* had reasonable grounds," *id.* at 441 (emphasis added), it had no occasion to decide the relevance of the knowledge or conduct of other official functionaries. The affidavit was based solely on the observations of the affiant. Hence, there was no other functionary.

The statements above are, however, inconsistent with Rugendorf v. United States, 376 U.S. 528 (1964). Speaking of information that had been received by the affiant from other official sources, the Court said:

> Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were *not those of the affiant*, they fail to show that the *affiant* was in bad faith or that *he* made any misrepresentations to the Commissioner in securing the warrant.

Id. at 533 (footnote omitted) (emphasis added). It should be noted however, that Petitioner subordinated the issue to two others: whether the affidavit was *facially* sufficient, and whether Petitioner was entitled to disclosure of an informant's identity. Brief for Petitioner at i-ii. Petitioner's offhanded treatment of the issue may have provoked the Court's thoughtless response. In any event, the statement in *Rugendorf* must be regarded as effectively overruled by Whiteley v. Warden, 401 U.S. 560 (1971).

If an informant is a law enforcement officer, there can be no doubt that he is an official functionary.[101] On the other hand, the informant may be a private person who was in no way engaged by an official to participate in the probable-cause process. To take a variation of an earlier example,[102] suppose that Officer X receives the following information from Z, a first-time informant: "I am the manager of the leather goods department at the Big Store. Five minutes ago, I saw D take a black and gold attache case from a counter display. He walked out of the store without paying for it." X verifies Z's status as manager. X also learns that D has prior convictions for shoplifting. X then drafts a facially sufficient affidavit, obtains an arrest warrant, and arrests D. An incidental search is made, and a concealed weapon is found. At the suppression hearing, the government's sole evidence is the warrant with affidavit. D concedes that the affidavit is facially sufficient, that X acted reasonably, and that he truthfully recounted to the magistrate the information he had received from Z as well as the fruits of his own inquiry. He proposes, however, to offer the testimony of A, B and C (or to cross-examine Manager Z) to establish that the incident allegedly observed by Z did not take place. Should the testimony be admissible?

If the testimony is believed, it will establish that Z, and Z alone, acted improperly; neither Officer X nor the magistrate violated any fourth amendment standards.[103] Although Z was in fact a functionary of the probable-cause process, he was no more of an *official* functionary than any other member of the public at large. He was not in the business of law enforcement, nor were his services in any way solicited by an official functionary. Moreover, had Z, himself, seized the weapon from D and given it to X—that is, had Z been the *sole* functionary of the process, the gun would have been admissible as a result of the holding in *Burdeau v. McDowell*[104] that the fourth amendment is inapplicable to wholly private action. The seizure in *Burdeau* was made by a private detective without governmental inducement or encouragement. Private detectives are ordinarily government licensees and do engage in activities related to law enforce-

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[101] *Cf.* Whiteley v. Warden, 401 U.S. 560, 568 (1971); Gambino v. United States, 275 U.S. 310, 314-16 (1927); Amsterdam, *supra* note 18, at 432.

[102] P. 738 *supra.*

[103] Despite Aguilar v. Texas, 378 U.S. 108 (1964), it was reasonable for both the affiant and the magistrate to rely on an informant who had not previously given reliable information. Some of the informant's information was verified by the affiant, Spinelli v. United States, 393 U.S. 410 (1969), and *Aguilar's* strict standards may be limited to professional or underworld informers. United States v. Burke, 517 F.2d 377, 380-81 (2d Cir. 1975).

[104] 256 U.S. 465 (1921).

ment. If their activities are regarded as wholly private for fourth amendment purposes, the activities of Z in the case at hand must also be ungoverned by fourth amendment standards. It would, therefore, be fruitless to let D make the effort to impeach Z's credibility. Even if it were clear that Z had lied to Officer X, the fourth amendment would not have been violated.

Between a case in which the informant is clearly a law enforcement officer and a case of wholly private activity, lie cases in which the informant's status is harder to define. For giving information about others, the informant may be promised small sums of money, small amounts of narcotics, immunity from arrest for certain offenses, or favorable treatment in a pending prosecution. On the other hand, the informant may divulge information in the unspoken hope of receiving some benefit. The relationship between informant and officer may be regularized and of long duration, or it may be inchoate.[105]

To decide specific cases, it is necessary to have criteria for determining when activity that is not wholly private within *Burdeau* becomes sufficiently infused with governmental interests to justify application of constitutional standards. The problem is far from novel. In civil cases, courts are often called upon to decide whether ostensibly private action is really "governmental" or "state" action for fifth or fourteenth amendment purposes.[106] In criminal cases, comparable issues arise in several contexts including search and seizure.[107] Indeed, a recurring question is whether fourth amendment standards govern the action of the employee of a carrier who opens a consigned package and finds contraband.[108] For present purposes, it is not important to identify the criteria for distinguishing private from governmental action. It is important, however, to note that in some of the situations mentioned above, the informant clearly should be deemed a government agent.[109] In terms of sub-facial attacks, this means that the defendant is, at the very least, entitled to inquire into the relationship between the informant and his official contact. Once he establishes the necessary relationship, he is then entitled, subject to *McCray v.*

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[105] For a discussion of the relationship between informants and officers, see Trent v. United States, 284 F.2d 286, 291 n.5 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 889 (1961).

[106] *E.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[107] Another context is entrapment. *See* Sherman v. United States, 356 U.S. 369, 374-75 (1958); United States v. Waddell, 507 F.2d 1226, 1228 (5th Cir. 1975).

[108] United States v. Newton, 510 F.2d 1149 (7th Cir. 1975); United States v. Krell, 388 F. Supp. 1372 (D. Alaska 1975). *Cf.* People v. Esposito, 37 N.Y.2d 156, 332 N.E.2d 863 (1975).

[109] See cases cited notes 107, 108 *supra*.

Illinois,[110] to try to impeach the veracity of the informant's information. Any other rule would grant the government an immunity from fourth amendment scrutiny whenever it turned over its undercover investigative work to persons without official designation.[111]

C. *Fourth Amendment Culpability*

Once it has been established that the source of an alleged misrepresentation is a person whose knowledge or conduct may be drawn into question by a sub-facial attack, we have to cope with two other problems: (1) the effect of determining that the misrepresentation was purposeful, knowing, reckless, negligent, or innocent (*i.e.*, the culpability or *mens rea* of the source), and (2) the effect of determining that the misrepresentation was or was not material in establishing probable cause. Although these problems seem analytically separate, they have often been blended both in cases and commentary with a resulting confusion that disserves fourth amendment values.

United States v. Carmichael[112]—a leading case[113]—is illustrative. The court stated that:

> Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. A completely innocent misrepresentation is not sufficient for two reasons. *Most importantly*, the *primary* justification for the exclusionary rule is to deter police misconduct . . . and good faith errors cannot be deterred. *Furthermore*, such errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, he has probable cause to believe that a crime has been committed . . . .
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> Negligent misrepresentations are theoretically deterrable, but

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[110] 386 U.S. 300 (1967).

[111] In developing the point that courts should consider the knowledge and conduct of all official informants, I have accepted the holding in McCray v. Illinois, 386 U.S. 300 (1967), that there is no *due process* right to discover an informant's identity for purposes of a motion to suppress. Although there is no tension between my views and *McCray* in a case in which the informant's identity is already known, tension undeniably exists if the informant's identity is not known. Indeed, what has been said above could easily be the basis for a *fourth amendment* right to disclosure. *See* Comment, *supra* note 1, at 127-33. If courts are persuaded to permit sub-facial attacks as broadly as I have suggested, they may want to reconsider *McCray*. Adherence to *McCray*, however, does not compel the rejection of my position. Although the two cannot co-exist in perfect harmony, few fourth amendment doctrines do. "For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product." Amsterdam, *supra* note 18, at 349.

[112] 489 F.2d 983 (7th Cir. 1973).

[113] The influence of *Carmichael* may be seen, for example, in United States v. Belculfine, 508 F.2d 58 (1st Cir. 1974); and United States v. Thomas, 489 F.2d 664 (5th Cir. 1973).

> no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further. We therefore conclude that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation. Even where the officer is reckless, if the misrepresentation is immaterial, it did not affect the issuance of the warrant and there is no justification for suppressing the evidence. Arguably, the same conclusion could be reached as to deliberate but immaterial misrepresentations. However, we conclude that if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing.[114]

Consider this statement first from the standpoint of culpability or *mens rea*. The court's position is that an innocent (*i.e.* not even negligent) misrepresentation should not result in the exclusion of evidence. The court's primary reason relates not to probable cause, but to the deterrence objective of the exclusionary rule. Although the court mentions probable cause, it relegates it to a secondary position, thereby turning fourth amendment theory upside down. If an innocent misrepresentation does not negate probable cause, there is no fourth amendment violation at all, and it is pointless to consider whether suppression would or would not advance any objective of the exclusionary rule.[115] Hence, the first question in every such case has to be whether the misrepresentation negated probable cause.

As noted in the preceding Section, reasonable mistakes do not impair probable cause.[116] Consequently, even though the *Carmichael* court considered the wrong issue first, it cannot be faulted for its conclusion. The same cannot be said, however, of its treatment of negligent misrepresentations. Without making even a half-hearted effort to justify its position, the court asserts that it is too difficult to determine "whether an officer was negligent or completely innocent in not checking his facts further."[117] Accordingly, the court holds that negligent misrepresentations should not result in the suppression of evidence even if the misrepresentation concerns a material matter. En route to its conclusion, the court does not deal with probable cause as a secondary consideration; rather, it ignores probable cause altogether, thereby stripping the problem of its fourth amendment garb.

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[114] 489 F.2d at 988-89 (emphasis added).

[115] P. 728 *supra*.

[116] P. 734 *supra*.

[117] 489 F.2d at 989.

Had the court dealt with probable cause, it would not have been able to resolve the matter by the unsupported assertion that the line between innocence and negligence is too fuzzy to be workable. Indeed, given the fact that the court did consider the probable cause issue in its discussion of innocent misrepresentations, it is fair to suggest that the court ignored the issue in its discussion of negligence for the very purpose of avoiding its impact.

The issue that the court ignored is whether the probable cause process embodies a standard of reasonable care. More precisely, the issue is whether a negligent misrepresentation may *ever* be said to negate probable cause.

The Supreme Court's most thoughtful effort to define or describe probable cause was made in *Brinegar v. United States*:[118]

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *McCarthy v. De Armit*, 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U.S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke v. United States*, 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of *reasonable caution* in the belief that" an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132, 162.
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> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of *reasonable* men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for ac-

[118] 338 U.S. 160 (1949).

> comodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.[119]

This quotation leaves no doubt that, as a matter of judicial gloss, the fourth amendment's requirement of probable cause embodies a standard of reasonableness.

As noted in Section IV (C) of this article, probable cause is a process that comprises separate parts. The narrow issue in *Brinegar* was whether, on the facts known to them, it was reasonable for federal agents to infer that the defendant had committed a crime.[120] Thus, the Court was concerned only with the *inference-drawing part* of the process. In *Carmichael*, however, the court dealt not with the inference-drawing part, but with the antecedent parts of *acquiring* and *transmitting* information to the magistrate (the inference drawer).[121] When *Brinegar* and *Carmichael* are added together, the awkward result is that integral parts of the same process are governed by different standards of care: under *Brinegar*, inference drawing is governed by a standard of reasonableness; under *Carmichael*, acquisition and transmission are governed by a standard no lower than recklessness. Given the equally crucial role that each part plays in the process as a whole, governance by different standards is unprincipled. From what has been developed in Section IV,[122] it is clear that, once the Supreme Court establishes that a standard of reasonableness governs *any* part of the process, the *same* standard must apply to *all* parts. *Carmichael* is, therefore, wrong.

Although the *Carmichael* court ignored *Brinegar*, it was not thereby compelled to adopt a standard of recklessness; after all, the court could have adopted a standard of reasonableness even if *Brinegar* had not been decided. It preferred not to do so, however, asserting that ". . . no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further."[123] It is hard to take the court seriously for a number of reasons.

First, the words "not checking his facts further" refer only to the *acquisition* phase of the probable-cause process.[124] They do not relate to the *transmission* phase. Yet, it is the transmission phase that is

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[119] 338 U.S. at 175-76 (brackets in original) (emphasis added).

[120] 338 U.S. at 162-63, 165-70.

[121] 489 F.2d at 987.

[122] See text *supra* at notes 89 & 90.

[123] 489 F.2d at 989.

[124] Indeed, the words refer only to a *part* of the acquisition phase.

most often involved in sub-facial attacks.[125] Rarely does a sub-facial attack involve the claim that an officer was negligent in not checking his information further.[126] Indeed, in *Carmichael* itself, all but one of the defendant's claims involved the transmission phase.[127] Consequently, the court's assertion is of marginal relevance at best.

Second, although the court declined to draw the line between innocence and negligence, it chose to draw it between negligence and recklessness. Of the two, the negligence-recklessness line is probably the fuzzier for the reason that recklessness comprehends culpability that ranges widely from "gross" negligence to "wanton" misconduct.[128] Thus, the line drawn by the court clarifies nothing.

Third, the line between innocence and negligence is one that is commonly drawn. In thousands upon thousands of lawsuits yearly, juries determine the innocence or negligence of drivers, doctors, government executives, and even law enforcement officers.[129] If it is workable for lay jurors to determine whether a police officer used unreasonable force, surely it is workable for a judge to determine whether an officer was negligent in acquiring or transmitting the information used to invade someone's privacy.

Fourth, the result of the line drawn in *Carmichael* is to leave unregulated a wide area of government misconduct. In our society, government intrusion is a necessary evil—an exception to the right to privacy. As an exception, it must be kept within narrow bounds to protect innocent privacy.[130] That we tolerate non-negligent mistakes is already a compromise. To tolerate negligent (and, perhaps, grossly negligent) errors would, in the words of *Brinegar*, "leave law-abiding citizens at the mercy of the officers' whim or caprice."[131]

The stance taken in *Carmichael* is unsupportable. Negligent misrepresentations, as well as those more culpable, should be within the scope of a sub-facial attack.[132]

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[125] United States v. Belculfine, 508 F.2d 58 (1st Cir. 1974); United States v. Damitz, 495 F.2d 50 (9th Cir. 1974); United States v. Marihart, 492 F.2d 897 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973); United States v. Harwood, 470 F.2d 322 (10th Cir. 1972).

[126] Other than *Carmichael*, the only case I have found involving the claim that an officer was negligent in not checking his information further is United States v. Henderson, 17 F.R.D. 1 (D.D.C. 1954).

[127] 489 F.2d at 987.

[128] *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 211-15 (1972).

[129] Indeed, whether state executive officers are liable for damages under 42 U.S.C. § 1983 may depend on "the existence of reasonable grounds for the belief formed . . . ." Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

[130] See *supra*, Section IV (A) & (B).

[131] 338 U.S. at 176.

[132] It may be argued that it is unfair to hold police officers (the administrators of the

D. *Materiality: A Problem of Fourth Amendment Perspectives*

1. The Problem and its Case-Law Solution

Once it has been established that the source of an alleged misrepresentation is a person whose knowledge or conduct may be drawn into question by a sub-facial attack, and that the misrepresentation was attended by culpability of the requisite degree, the misrepresented information will be excised from the affidavit, and the determination of probable cause will be based on the allegations remaining.[133] If those allegations are insufficient, a fourth amendment violation has occurred.[134] Suppose, however, that the allegations are sufficient. *Carmichael* holds that the evidence still must be suppressed if—but only if—the misrepresentation was "deliberate."[135] Another recent case, *United States v. Thomas*,[136] requires, as a predicate for suppression, intention to deceive the magistrate.[137] Both cases rely on an article[138] that urges the following rationale:

> In every case an affiant's misstatement will either be material to the finding of probable cause or it will be superfluous. In every case, also, the affiant will have supplied the misstated allegation either intentionally, negligently, or innocently. The easiest case for suppression is a warrant based on an intentional misstatement by an affiant-agent. This would be a clear case of proscribed government action (perjury) which could be to some degree deterred by

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acquisition and transmission phases of the probable-cause process) to the same standards applicable to a magistrate (administrator of the inference-drawing phase). Police officers, after all, have less training than magistrates and may have to make quick, on-the-spot judgments. The argument, however, is fatally flawed.

First, in the wide variety of cases in which the police properly proceed without a warrant, the officer draws the inferences, and is necessarily governed by a standard of reasonableness. Indeed, this was the very situation that existed in Brinegar v. United States, 338 U.S. 160 (1949).

Second, with reference to arrest warrants, the inference-drawing phase may constitutionally be entrusted to a court clerk, Shadwick v. City of Tampa, 407 U.S. 345 (1972), who in all likelihood has less training than a police officer.

Third, regardless of the above, if the government entrusts important parts of the probable-cause process to non-lawyers without giving them adequate training, it is the government's fault. The government should not be permitted to assert its own dereliction to defeat the protection of innocent privacy. *Cf.* L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT 64-65 (1974).

[133] United States v. Gonzalez, 488 F.2d 833, 838 (2d Cir. 1973); United States v. Upshaw, 448 F.2d 1218, 1221-22 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972).

[134] United States v. Harwood, 470 F.2d 322, 325 (10th Cir. 1972).

[135] 489 F.2d at 989.

[136] 489 F.2d 664 (5th Cir. 1973).

[137] 489 F.2d at 669.

[138] Kipperman, *supra* note 7.

quashing warrants based thereupon. One could analogize intentional inaccuracy by the affiant to the knowing use of perjured testimony at trial and hold that the public policy against government distortion requires automatic suppression of the evidence obtained in such a manner regardless of prejudice. Thus an intentional misstatement of fact in the affidavit would be fatal even if it were immaterial to proving probable cause, or if, unbeknownst to the lying affiant, the facts alleged in bad faith turned out to be true.

A more likely—and more difficult—case than intentional distortion is that of a negligent or unreasonable assertion in an affidavit, either (1) an assertion based on a negligent personal investigation by the affiant himself, (2) too forceful a claim of evidence of reliability of a confidential informer, (3) reliance on a generally trustworthy informer when the circumstances were such as to warn the affiant to verify the information further "this time," or (4) a negligent misstatement by the affiant of the informer's story. A rule quashing all warrants where such negligence is shown requires, it seems to me, too high a price in crime protection to be justified. Exclusion of evidence only when procured by negligent misstatements *material* to showing probable cause should prod police to make prudent investigations about as well as would a full-scale exclusionary rule, since the police will usually not know until they apply for the warrant exactly *which* allegations will be critical. They will therefore probably seek to gather as much untainted evidence as possible to support the warrant against challenge. Allowing the introduction of evidence when the affiant's negligence affects only an immaterial allegation will save a number of otherwise unobjectionable convictions without significantly restricting the deterrent values of the rule. Therefore, courts need suppress evidence only when obtained under a warrant which would not have issued but for the negligent misstatement by the affiant.[139]

The most salient aspect of the proffered rationale is that it relies on a goal of the exclusionary rule (deterrence) without asking whether there was a violation of the fourth amendment in the first instance. As noted earlier, this approach turns fourth amendment theory upside down. If the fourth amendment has not been violated by an immaterial misrepresentation, it is unnecessary to inquire further.[140] Of course, even without finding a violation of the fourth amendment, a court might invoke either the due process clause or the doctrine of supervisory powers to deal with the culpable, but immaterial, misrepresentation. In the present context, however, neither doctrine makes

[139] *Id.* at 831-32 (footnotes omitted) (emphasis in original).

[140] *See* text *supra* at note 115.

much sense unless it is intended to protect the very values that underlie the fourth amendment. Thus, the question remains whether the amendment was violated.[141]

2. Perspectives

The question may be approached from different perspectives that may beget different results. In his brilliant essay on the fourth amendment,[142] Professor Anthony Amsterdam asks

> . . . whether the amendment should be viewed as a collection of protections of *atomistic* spheres of interest of individual citizens or as a *regulation* of governmental conduct. Does it safeguard *my* person and *your* house and *her* papers and *his* effects against unreasonable searches and seizures; or is it essentially a regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us *collectively* secure in our persons, houses, papers, and effects against unreasonable searches and seizures?[143]

If we take an atomistic view, we are likely to conclude that the fourth amendment is not violated by an immaterial misrepresentation—even one that is deliberate or made with purpose to deceive the magistrate. The very immateriality of the misrepresentation means that it could have played no role in the magistrate's decision to authorize intrusive action. As long as that decision was fully supported by the rest of the information conveyed to the magistrate, the defendant has nothing to complain about, for the intrusion was justified.[144]

If we take a regulatory view, however, we might well hold that the fourth amendment is violated by any misrepresentation that is culpable—even one that is immaterial and only negligent. While seeking the authority to take intrusive action, the officer (a functionary of the probable-cause process) culpably misrepresented information to the magistrate (another functionary of the process). Although the culpable misrepresentation did not negate probable cause in *this* case, it nevertheless put innocent privacy to risk. If courts ignore culpable, but immaterial, misrepresentations, they will thereby induce or encourage other misrepresentations some of which *will* be

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[141] Mr. Kipperman's analogies to perjury are not persuasive. The criminal law of perjury ordinarily requires materiality as an element of liability, R. PERKINS, CRIMINAL LAW 461-63 (2d ed. 1969), and cases involving the knowing use of false evidence do not ignore the bearing that the evidence might have had on the outcome of the case. *E.g.*, Miller v. Pate, 386 U.S. 1 (1967). *Cf.* Giles v. Maryland, 386 U.S. 66 (1967).

[142] *Supra* note 18.

[143] *Id.* at 367 (emphasis on possessive pronouns in original; other emphasis added).

[144] *E.g.*, United States v. Carmichael, 489 F.2d 983, 989 (7th Cir. 1973).

material and *will* negate probable cause. Given the limitations of the warrant-issuing process, the magistrate will not be able to detect these misrepresentations.[145] As a result, he will issue some warrants without probable cause, and innocent privacy will be needlessly infringed, contrary to the central purpose of the fourth amendment.[146] However, if courts do not ignore culpable, but immaterial, misrepresentations, they will remove the inducement[147] by conveying to the functionaries of the probable-cause process the strong signal that tomorrow's case is as important as today's; that innocent privacy is the desideratum; and that is subverted by any maladministration of the process whether it is deliberate, or merely negligent, or any shade in between.

Under an atomistic view of the fourth amendment, *Carmichael* and *Thomas* go too far by excluding evidence when the misrepresentation, although deliberate or fraudulent, was immaterial. Under a regulatory view, they do not go far enough, for they reject the exclusionary sanction when the misrepresentation, although immaterial, was reckless or negligent. In result, the cases are neither fish nor fowl, being partly atomistic, partly regulatory. They are unsatisfactory for another reason as well; in neither case did the court even indicate an awareness that the basic problem was one of choosing a fourth amendment philosophy. That is not surprising, however. As Professor Amsterdam has observed, the Supreme Court itself has never directly addressed the choice between atomistic and regulatory perspectives.[148] Yet, many of its decisions—cases dealing with standing and attenuation, for example—can be explained only on the basis of an unquestioned, but barely articulated, acceptance of the atomistic view.[149]

Professor Amsterdam criticizes the atomistic view as disserving collective or innocent privacy by focussing too narrowly on the adventitious aspects of particular cases.[150] As an example, he poses a situation in which officers, having neither probable cause nor a warrant, break into a hotel room because they suspect that the occupants have robbed a bank. Unknown to the police, however, the occupants have

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[145] *See* text *supra* at notes 11 et seq.

[146] *See* text *supra* at notes 63-68.

[147] On the use of the exclusionary rule to remove inducements, see Amsterdam, *supra* note 18, at 432.

[148] *Id.* at 367.

[149] *Id. See id.* at 433. On the other hand, some of the cases in which the court has insisted on search warrants seem to have a regulatory focus. *See* Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

[150] *Supra* note 18 at 367-69, 438-39.

already abandoned the room, leaving behind incriminating evidence.[151] Under an atomistic view, there was no fourth amendment violation. The occupants, having abandoned the room, had no constitutionally protected interest in it at the time of the entry. Thus, the entry was proper even though the police believed the room was occupied and engaged in conduct that strikes at the very heart of fourth amendment values.[152] Surely, Professor Amsterdam is right when he says that the police have to be taught *now*, in *this* case, regardless of the fortuity of abandonment, that they cannot continue such conduct.[153] Under a regulatory view, that lesson would be taught.[154]

But the regulatory view is not without its imperfections. Suppose, as a variation of Professor Amsterdam's case, that the officers reasonably, but erroneously, believed that the room was *abandoned*, entered it with the consent of the desk clerk, and found the robbers counting their loot. Under a regulatory view, it might be argued that the police conduct was proper even though the defendants' privacy was invaded without a warrant or probable cause. Under an atomistic view, however, that argument would be insupportable.

The fourth amendment is a rough guide to proper and improper police conduct. In common with other guides, it ought to be consulted before the trip begins, not after the trip is over. To be understandable, its rules ought to be fairly simple and straightforward, and not qualified by too many or too fine exceptions. The overarching concern of the fourth amendment is to keep the risk of invading innocent privacy tolerably low.[155] If the police want to enter and search a hotel room—an enclave that has been, may be (perhaps is still being), and certainly will be used to shield the occupants from the world outside, they should be required to have probable cause and a warrant. I am not saying that the requirements should be imposed in every case; exceptions are inevitable. But I am saying that the outcome of different cases should not hinge on whether a police officer correctly or incorrectly believed that the room was occupied or abandoned.

If cases are not to turn on such distinctions, however, it will be necessary to take the position that the atomistic and regulatory views are not mutually exclusive alternatives, but partners in the protection of privacy. If, on *either* view, the police conduct was improper, the

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[151] *Id.* at 368.

[152] *Id.*

[153] *Id.* at 368-69.

[154] *Id.* at 369.

[155] *See* text *supra* at notes 63-68.

exclusionary sanction should follow.[156] What I am suggesting may, at first impression, seem like a heads-I-win, tails-you-lose perspective of the fourth amendment, but it is not. Although the combination of both views is a device for maximally safeguarding innocent privacy from needless impingement, it is not a strategem for prohibiting all intrusive action or strangling law enforcement. Even under a combined or integrated theory, it will be necessary for courts to determine whether the police conduct passed the threshold of risk to innocent privacy or constituted a needless impingement; and there is no reason to believe that all or even most of the decisions will favor the defendant.

If one takes an atomistic-regulatory view of the fourth amendment, it is clear that *Carmichael* and *Thomas* inadequately deal with the problem of immaterial misrepresentations by distinguishing among *kinds* of culpability instead of stressing the *fact* of culpability and the needless risk to innocent privacy. Both courts should have invoked the exclusionary rule to rid the probable-cause process of the potential effects of *any* culpable misrepresentation, regardless of immateriality in the particular case.[157]

E. *The Requirement of a Preliminary Showing*

Up to this point, I have been concerned with the scope of a rule permitting sub-facial attacks. Now I want to address a major procedural problem. Many of the courts that permit sub-facial attacks

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[156] The blending of atomistic and regulatory perspectives has already been suggested in the related context of standards for determining whether a confession is voluntary. Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's "Criminal Interrogation and Confessions,"* 17 RUTGERS L. REV. 728, 753 (1963).

[157] *But see* Rugendorf v. United States, 376 U.S. 528, 533 (1964):

> The factual inaccuracies depended upon by petitioner to destroy probable cause—*i.e.*, the allegations in the affidavit that petitioner was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business—were only of peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit.

As indicated in note 100 *supra*, however, *Rugendorf* cannot fairly be regarded as dispositive of any of the issues discussed in this article.

The discussion of materiality in the text above has assumed that the source *affirmatively* represents as true that which is not. There is, however, another context in which the materiality issue may arise: the source may convey less than all of the information he possesses. Whether an *omission* to include information violates the fourth amendment should turn on whether a prudent or reasonably cautious person would have omitted the same information. In answering the latter question, however, it does seem appropriate to consider the materiality of the omitted information. If information is clearly immaterial, there is no reason to transmit it. Any other rule would make the drafting of affidavits intolerable.

force the defendant to jump a preliminary hurdle. They refuse to give the defendant a hearing unless he makes a preliminary showing that the hearing may be fruitful.[158] The requirement ranges in stringency from ". . . some initial showing of some sort—some suggestion of a basis or area of doubt . . . ."[159] to "a showing of falsity of allegation—a showing presumably not easily to be made in most cases."[160] As codified by the Model Code of Pre-Arraignment Procedure, the requirement is as follows:

> The moving party shall be allowed to make the contest . . . only upon preliminary motion, supported by affidavit, setting forth substantial basis for questioning the good faith of the testimony, and such party shall have the burden of proving the lack of good faith.[161]

By contrast, neither in the cases nor in the Model Code is a similar requirement imposed upon the defendant who wants to attack the factual basis of action taken without a warrant.[162] Is the requirement justifiable?

In only one of the cases that impose the requirement is an effort made to articulate a rationale. In *United States v. Halsey*,[163] the court said:

> It is not only because "[r]esponsibility is the great developer of men"—or even because he is the real point of protection—that the Commissioner's independent judgment merits a substantial measure of finality. On a less lofty but eminently practical level, there is the fact that the work must be divided and get done . . .
>
> In ruling against such a right [to make a sub-facial attack without a preliminary showing], we strike a reasonable balance between prudence and the ideal. The question, after all, is not as to guilt or innocence, and it does not diminish the value of privacy to acknowledge this . . . . To face pertinent facts, the issue as we have it arises only because the search proved fruitful. And while this, on familiar ground, could not validate a lawless search . . . it serves as at least some assurance that the price of refusing to retrace the Commissioner's steps in every case is not excessive.[164]

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[158] *E.g.*, United States v. Belculfine, 508 F.2d 58 (1st Cir. 1974); United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. Halsey, 257 F. Supp. 1002 (S.D.N.Y. 1966).

[159] United States v. Halsey, 257 F. Supp. 1002, 1006 (S.D.N.Y. 1966).

[160] United States v. Belculfine, 508 F.2d 58, 63 (1st Cir. 1974).

[161] Section SS 290.3(1)(b).

[162] See Section SS 290.3(2).

[163] 257 F. Supp. 1002 (S.D.N.Y. 1966).

[164] *Id.* at 1006 (footnotes omitted).

At least four arguments may be extracted from this statement. The first two are related. They are that entertaining sub-facial attacks without requiring a preliminary showing of merit would destroy the warrant-issuer's sense of responsibility, and that the protection afforded fourth amendment values by the warrant-issuer makes sub-facial attacks generally unnecessary. Both arguments have also been advanced as reasons for prohibiting any sub-facial attack. In that context, they were considered earlier and found transparently inadequate.[165] They are no more valid here.

The third and fourth arguments are also related. They are that routine attacks would impede the disposition of cases, and that, on balance, this cost outweighs the benefits to privacy that flow from the exclusionary rule—benefits, it should be added, that inure to the guilty. These arguments, too, have been urged in bar of sub-facial attacks.[166] Implicit in them is a perspective of the fourth amendment and the probable-cause process that is neither atomistic nor regulatory, but myopic.

In striking a balance, the *Halsey* court had its thumb on the scale. Although it gave full weight to judicial efficiency, it gave short weight to the probable-cause process. Nowhere in the opinion does the court discuss the effect on privacy of requiring a preliminary showing. What is the effect likely to be?

To answer that question it is necessary to ask another: what procedures will govern the requirement of a preliminary showing? No procedures have been established in the reported cases. The Model Code, however, does set out a general procedure which will probably be influential. The model procedure requires the defendant to file a motion "supported by affidavit, setting forth substantial basis" for making the sub-facial attack.[167] According to the Code's commentary, the affidavit must contain a "substantial suggestion that the evidence on probable cause should not be credited."[168] The purpose of the requirement is to discourage frivolous attacks.[169]

Who will file the affidavit and on what will it be based? In some cases, the affidavit will be filed by the defendant, defense lawyer, or other persons who have information that contradicts the allegations of the warrant affidavit. But such cases will be rare. In the vast

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[165] See Section II *supra*.

[166] *Id.*

[167] *Supra* note 161.

[168] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 571 (Prop. Off. Draft, April 15, 1975) (Commentary).

[169] *Id.*

majority of cases, a sub-facial attack is intended to demonstrate that the affiant misrepresented either the information conveyed by an informant or the informant's reliability.[170] That demonstration, however, cannot feasibly be made without conducting a "fishing" interrogation of the informant or affiant. Under *McCray*,[171] the informant's identity need not be disclosed. Even if the informant's identity is known, however, it is unlikely that either the informant or the affiant will submit to an interview voluntarily, and compulsory process is generally unavailable.[172] As a result, a procedural rule requiring a preliminary showing of merit will, in the vast majority of cases, have the same effect as a substantive rule barring all sub-facial attacks. The substantive rule endangers innocent privacy by allowing the maladministration of the probable-cause process to escape judicial scrutiny and control. It is, as I have argued in Section IV, unconstitutional. So also is its procedural analogue as fashioned in *Halsey* and the Model Code.

Declarations of unconstitutionality have their consequences, too. If sub-facial attacks are routinely entertained, some of them will prove frivolous and time-wasting. In civil practice, a motion for summary judgment is used to screen out the frivolous, but well-pleaded, case.[173] A similar technique could be used in criminal cases if discovery depositions were available. The defense lawyer would then have the opportunity to compel the out-of-court interrogation of a known informant or affiant, and requiring a preliminary showing would therefore have little impact. But discovery depositions are not generally available in criminal cases at the present time.[174] Until they are, the system will have to suffer the effects of its own nearsightedness by giving plenary treatment to the frivolous as well as the meritorious. The one course that is not open is to throw out the meritorious with the frivolous.

VI. CONCLUSION

Two fundamental judgments underlie the fourth amendment: that free people have a right to be free from unnecessary, or unneces-

[170] *E.g.*, United States v. Belculfine, 508 F.2d 58, 60 (1st Cir. 1974); United States v. Thomas, 489 F.2d 664, 666 (5th Cir. 1973); United States v. Carmichael, 489 F.2d 983, 987 (7th Cir. 1973); United States v. Harwood, 470 F.2d 322, 324 (10th Cir. 1972); United States v. Upshaw, 448 F.2d 1218, 1221 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972).

[171] McCray v. Illinois, 386 U.S. 300 (1967).

[172] Most jurisdictions do not permit discovery depositions in criminal cases. Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 1237-38 (1974).

[173] *See* 6 J. MOORE, FEDERAL PRACTICE 2057 (2d ed. 1975).

[174] *Supra* note 172.

sarily broad, intrusion by the functionaries of government, and that officially authorized intruders cannot be trusted to restrain themselves to intrude with necessity and then only narrowly.[175] The two judgments are embodied in the two clauses of the fourth amendment. The first clause creates or recognizes the "right of the people." The second imposes restrictions on officially authorized intruders in order to protect innocent privacy from needless impingement. Extraordinary cases aside, the restrictions are probable cause, particularity and warrants. The requirement of probable cause is implemented by a multifaceted process. In a case involving a warrant, the process has three parts: acquisition of information, transmission to a magistrate, and evaluation by the magistrate. Each part, no less than the others, plays a vital role in serving fourth amendment goals.

Facial attacks—the validity of which has never been questioned—assert the malfunctioning of the evaluation part. Sub-facial attacks implicate the other parts, primarily transmission. Given the equally crucial role played by each part, sub-facial attacks should, as a matter of fourth amendment law, be permitted without restriction, for they go to the very heart of the protection of privacy. Prohibiting sub-facial attacks or imposing restrictions that are functionally equivalent to prohibition "reduces the Fourth Amendment to a form of words."[176]

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[175] *See* Amsterdam, *supra* note 18, at 432-33. The historical basis for the judgments is traced in N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-78 (1937).

[176] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).